IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 2003 OF 2007
WITH
SUMMARY SUIT NO. 329 OF 1981

Central Bank of India. ... Plaintiffs.

V/s.

The Sion Bakers and Confectioners
Pvt. Ltd. & Ors. ... Defendants.

Mr. V.K. Nair i/b. Little & Co. for the Plaintiffs.
Mr. Ajay Panicker for the Defendants.

CORAM : A.M. KHANWILKAR, J.
DATE : 18TH SEPTEMBER 2007.

P.C. :

. Pursuant to the order dated 3rd September 2007, the plaintiffs have filed affidavit of Shri P.D. Hemnani, Senior Manager of the plaintiff - Bank served on 12th September 2007. The affidavit indicates that there is still outstanding amount of Rs.69,000/- out of the decretal amount to be recovered from the defendants jointly and severally. It is stated that defendant no.4 has expired. In other words, the decree passed against defendant nos.1,2 and 4 has still not been fully satisfied. In that view of the matter, the plaintiffs will have to proceed with this suit against defendant no.3. According to the plaintiff, the defendant no.3 is jointly and severally liable to pay the suit claim being one of the guarantor and director of defendant no.1 - company.

2. Counsel for defendant no.3 however contends that the issue as to whether defendant no.3 is liable to pay the amount in his capacity as guarantor in respect of the suit amount is already answered by this Court in Chamber Summons No.447 of 2006 decided on 20th July 2006. However, in my view, that aspect can be considered at the appropriate stage and can be answered in the final judgment to be pronounced by this Court while disposing of the suit pending against defendant no.3.

3. In so far as relief claimed in terms of prayer clause (b) of the motion is concerned, the same is worked out, in view of the affidavit of Mr. P.D. Hemnani.

4. In so far as prayer clauses (a), (c), (d) and (e) are concerned, those are matters which will be relevant at the trial of the suit. Issues are already framed on the basis of written statement filed by defendant no.3. Issue no.3 would require plaintiffs to prove that the defendants are jointly and severally liable to pay the suit claim. That issue is wide enough to consider the claim of defendant no.3 that he stands discharged from the suretyship by virtue of provision of Section 141 of the Contract Act or by virtue of provision of Section 139 of the Contract Act. The reasons mentioned in the affidavit in

support of the present motion, that will be matter of evidence which will have to be brought on record during the trial of the suit. To facilitate defendant no.3 to bring on record suitable evidence to make relevant claim in terms of prayer clauses (c) and (d) of the motion, the plaintiffs shall disclose on affidavit the status of the suit property of plaintiff - bank such as machineries, furnitures, etc. mentioned in Exhibit 'B' to the plaint and raw-materials, etc. mentioned in the schedule to the agreement in Exhibit 'H' to the plaint and the total amount relief from the said account shall be filed by the plaintiff within three weeks from today. In other words, motion will succeed in terms of prayer clause (a) on the above terms.

5. As mentioned earlier, in so far as prayer clauses (c) and (d) are concerned, those are matters which will have to be answered at the end of the trial. Accordingly, those issues are kept open to be decided on its own merits and in accordance with law. No relief can be therefore granted in terms of prayer clauses (c) and (d) on the motion at this stage.

6. In so far as relief in terms of prayer clause (e) is concerned, the stand of the plaintiffs is to release the monthly income deposit receipts and the interest accrued thereon as well as on the recurring

deposit account of the wife and two sons of defendant no.2. The wife and two sons of defendant no.3 have already filed proceeding in this Court. That issue will have to be considered in appropriate proceedings and at appropriate stage. Till the issue is answered finally one way or the other, it will not be possible to accept the request of defendant no.3 to order release of the said securities of the said monthly income deposit receipts or recurring deposit amount as prayed. Accordingly, relief in terms of prayer clause (e) is refused with liberty to defendant no.3 to pursue his claim in that behalf and/or on behalf of his wife and two sons in the appropriate proceedings.

Those questions are kept open.

7. The motion is accordingly disposed of on the above terms with no order as to costs. The suit shall now proceed further for hearing as issues are already framed. The suit will not proceed without recording of evidence. The plaintiff to file affidavit of evidence and documents on or before 2nd November 2007.

Place this matter under caption "for Filing Affidavit of Service" on 2nd November 2007.

(A.M. KHANWILKAR,J.)